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No. 03-1440

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, and MICHAEL ILASZCAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY TO BRIEFS IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points raised in the Briefs in Opposition filed by Respondent, Michael Ilaszczat, and the Federal Respondent, Solicitor of Labor.

I. This Matter Presents the Compelling Opportunity for the Supreme Court to Set Forth Clear Limits to the Zone of Special Danger Doctrine Which Has Heretofore Been Applied to Impose Strict Liability Against the Employer and Carrier in Defense Base Act Matters.

The Solicitor is incorrect in asserting that limits to the zone of special danger doctrine have been established in Circuit Court precedent. To the contrary, the Ninth Circuit Court's ruling in this matter exemplifies that the coverage and scope of the zone of special danger doctrine has been greatly expanded to include the personal "frolics" of Defense Base Act ("DBA") employees which Justice Frankfurter expressly identified as being beyond the coverage of the DBA. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951). Rather, the Circuit Court cases cited to by the Solicitor as establishing the "limits" of the zone of special danger doctrine provide a compelling reason for the Supreme Court to address this issue.

The Solicitor cites a case from the D.C. Circuit involving a widow who sought DBA benefits after having participated in the murder of her husband, *Kirkland v. Air Am., Inc.*, 23 Ben. Rev. Bd. Serv. 348 (1990), *review denied*, *Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (Table), and a case from the First Circuit involving an employee who asphyxiated himself while masturbating in a closet, *Gillespie v. General Elec. Co.*, 21 Ben. Rev. Bd. Serv. 56 (1988), *aff'd*, 873 F.2d 1433 (1st Cir.

1989) (Table) as Circuit Court cases which have "recognized limits of the zone of special danger doctrine." (Fed'l Res. at 7).

The *Kirkland* or *Gillespie* matters do not set forth the "recognized limits" of the D.C. or First Circuit Court of Appeals, respectively, because in both cases the court merely affirmed the lower court's denial of benefits without opinion. These matters cannot reflect what Judge Frankfurter considered the controlling boundaries when the zone of special danger doctrine was established by the Supreme Court considering the extremes of conduct involved in these matters.

In *Kirkland*, the widow sought DBA benefits after she willfully participated in the felony which lead to her husband's death. The widow in Kirkland, whom the decedent had met and married while working in Vietiane, Laos for Air America: participated in a plot along with her boyfriend and another man to rob her husband; drugged her husband on the night of the felony with insecticides, arsenic, atrophine, and valium which were placed in a drink which the widow prepared for her husband; agreed to be tied up and gagged while the robbery was taking place to disguise her participation; and was charged with murder and burglary and jailed by the Vietiane policy for nine months and was later freed on bail and never tried by the new communist government in Laos. Under these circumstances, the Administrative Law Judge found that the widow's "participation in the murder of her husband effectively severed any causal relationship which may have existed between the conditions created by his job and his death." *Kirkland v. Air Amer. Inc.*, 23 Ben. Rev. Bd. Serv. at 348-49. In so ruling, the Administrative Law Judge held that the judicial maxim that a wrongdoer should not be allowed to benefit from her wrongdoing applied squarely to the widow's claim for DBA benefits since she willfully participated in a felony which lead

to her husband's murder. *Id.* at 350. The Administrative Law Judge found support for his holding under Section 3(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(c), which excludes injuries which arose from the intent of the employee to injure himself or another. *Id.* at 350-51.

Thus, under *Kirkland*, the "recognized limits" to the zone of special danger doctrine referred to by the Solicitor involve a widow's intentional participation in a felony which leads to the death of her husband/employee and then seeks dependency death benefits under the DBA. It is respectfully submitted that these are no "limits" at all.

In *Gillespie*, the widow sought DBA benefits 21 years after her husband died when he accidentally hung himself in his closet while trying to temporarily asphyxiate himself during autoerotic sexual activity while he was stationed at the Ramstein Air Force Base in West Germany. The Administrative Law Judge held that the employee's "separation from his spouse and family with the attendant loneliness" established the zone of special danger which was created by the conditions of his employment and awarded the widow DBA benefits. *Gillespie v. General Elec. Co.*, 21 Ben. Rev. Bd. Serv. at 57-58 The Benefits Review Board held that, as a matter of law, "this is such a case" in which the employee's course of conduct might go so far from his employment and service to his employee that it would be unreasonable to find that the injuries suffered arose in the course of employment. *Id.* at 472.

Similar to *Kirkland*, *Gillespie* cannot serious be considered a case which sets forth the "recognized limits" of the zone of special danger doctrine. Both of these cases present mutually unique and extraordinary factual circumstances not in any way presenting guidance of any kind to the administrative process

and the courts as to the application of the zone of special danger doctrine. As stated in the Petition, the Circuit Courts have failed to advise of any limits thereby, de jure, diminishing the Supreme Court doctrine. With the exponential increase in DBA matters due to the Government's military involvement in Iraq and Afghanistan, United Nations peacekeeping efforts in Bosnia and around the world, and government service projects worldwide this matter presents the clear and beneficial opportunity for the Supreme Court to address and set forth clear limits to the zone of special danger doctrine within those intended by Justice Frankfurter.

II. The Ninth Circuit Court of Appeals Imposed Strict Liability In Determining Coverage Under the Zone of Special Danger Doctrine.

The Solicitor erroneously asserts that the Ninth Circuit Court of Appeals properly applied the reasonably foreseeable standard, as set forth in *O'Leary*, in determining coverage of this incident under the zone of special danger doctrine. Neither the cases nor factual findings cited to by the Solicitor on this issue are supportive of the Solicitor's position.

A comparison of the cases cited to by the Solicitor on this issue and the incident in which Ilaszczat was injured supports that the Ninth Circuit applied strict liability in this matter and not a reasonably foreseeable standard. In particular, the cases cited to at pages 6-7 of the Solicitor's brief present the situation in which an employee was injured in an activity which was a reasonably foreseeable risk of working in the foreign employment locale. *See, e.g., Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (Employee was killed in a motor vehicle accident while returning to base from a nearby town); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*,

380 U.S. 359 (1965) (employee was injured while on a recreational outing during his employment in South Korea); *O'Leary v. Brown-Pacific-Maxon, Inc.*, supra (employee drowned while attempting, along with 20 other people, to rescue a swimmer from a dangerous waterway near the employer's facility in Guam while returning from the employer provided recreation center).

Ilaszczat's claim brings within the zone of special danger doctrine an entirely different category of incidents which by application eliminate any limits to the zone of special danger doctrine to impose strict liability upon the Employer and Carrier. Ilaszczat was injured when he bet an MP $100 that the MP was not fast enough to kick him in the head. Ilaszczat's conduct was strictly prohibited by the Military and resulted in his permanent debarment from the Johnston Atoll. In that regard, it is impossible to reconcile Ilaszczat's claim and those of *Gondeck*, *O'Keefe*, and *O'Leary*, within the same legal principal.

The factual findings by Judge Kaplan which the Solicitor cited to further establish that the zone of special danger doctrine was circumvented in this matter. At page four of its Brief, the Solicitor cited to Judge Kaplan's finding that Ilaszczat's injury fell within the zone of special danger doctrine because it was "reasonably foreseeable" that employees would participate in the type of frolic involved in this incident due to the existence of social clubs and isolation on the Johnston Atoll and that, even if the conduct was unauthorized, it was still compensable because it was "reasonably foreseeable." (Fed'l Res. at 4).

It is a finding without support that it is reasonably foreseeable that one patron at a bar will bet another patron $100 that the second patron cannot kick the first patron in the head. Slipping on liquid while playing pool is reasonably foreseeable.

The type of conduct in which Ilaszczat was involved in this matter is not, under any circumstances, reasonably foreseeable.

The Solicitor also cited to the Judge Kaplan's finding that Ilaszczat participated in this karate challenge thinking that he would not get hurt, (Fed'l Res. at 4), *i.e.* he did not intend to get injured. What the Solicitor and lower courts ignored was that where Ilaszczat and the MP involved in this contest bet $100.00, they both intended to succeed. That is, Ilaszczat did not intend to get kicked in the head by the MP and the MP intended to kick Ilaszczat in the head. The mere description of this incident supports that the imposition of DBA liability upon the Employer and Carrier is absurd. Further, consideration of whether Ilaszczat thought or intended that an injury would arise from the activity at issue is not the legal boundary which Justice Frankfurter set for the zone of special danger doctrine.

III. The Ninth Circuit Court of Appeals Failed to Consider In Any Respect The Importance and Relevance of The Military's Code of Conduct and the Injured Worker's Debarment From the Work Site For Having Acted in Clear Violation Thereof.

Strikingly absent from the Ninth Circuit Court's opinion and the Briefs in Opposition was any reasonable legal basis for ignoring the impact of the code of conduct established by the Military commanders on the Johnston Atoll. All employees and employers on the Johnston Atoll were obligated, under sanction of debarment, removal from the atoll and recision of the contract, to act in strict accord with the military's rules of conduct. Consequently, violations of such rules, as Ilaszczat's, are relevant to the assessment of limits of the zone of special danger doctrine. The Ninth Circuit's failure to address the military's rules of conduct represents its failure to properly assess parameters of the zone of special danger doctrine.

The Solicitor misconstrues the second issue raised in the Petition for Writ of Certiorari concerning the impact and parameters of the zone of special danger doctrine where the standards of conduct in the employment locale are established by Military command as necessary for completion of the military mission. Contrary to the solicitor's argument, this is not an issue of whether the employee's conduct was egregious as both egregious and reasonable conduct can run a foul of rules of discipline established at a military base. Nor is this an issue of whether the employee deviated from the course of employment because the zone of special danger doctrine only applies to off-duty activity generally not considered to be within the course of employment. Fed'l Resp. at 7-8. The issue is whether and to what extent Military standards of conduct critical to completion of military mission are applied to the zone of special danger doctrine.

Administrative Law Judge Kaplan found that the zone of special danger completely supplants military governance in the employment locale. In particular, Judge Kaplan found it irrelevant whether Ilaszczat's actions where prohibited by the military so long as they were foreseeable, Pet. App. at 45a-46a., a legal position which the Ninth Circuit affirmed. *Id.* at 28a. In so doing, the lower courts ignored entirely the acknowledgment in *O'Keefe*, 380 U.S. at 364, that whether the employee was engaged in prohibited behavior when injured is relevant to determining coverage under the zone of special danger doctrine.

In this error of ever increasing involvement by private employment in all aspects of military operations, this case presents a compelling opportunity for the Supreme Court to establish parameters of the zone of special danger doctrine where standards of conduct in the employment locale are established by military command as critical for completion of the military

mission. Certainly, it cannot be as the lower courts in this matter found that clearly established military standards of conduct of which all employees are aware are irrelevant of determining coverage under the zone of special danger doctrine. Thus, it is critical that the Supreme Court address this issue by granting Certiorari.

IV. The Claimant's Bar Supports the Petitioner's Prayer for the Supreme Court to Consider this Matter.

The Respondent, Michael Ilaszczat, agrees that review of this matter by the Supreme Court is necessary to address the limits of the zone of special danger doctrine and the relationship of Military command orders upon DBA coverage. (Res. at 9). In particular, Ilaszczat indicates that, as the zone of special danger doctrine is judicial created, granting certiorari benefits DBA workers, employers, and carriers in determining coverage "during their off-clock time." (Res. at 9). Ilaszczat asserts that he was abandoned by the Employer and Carrier while the dispute between the parties over coverage was litigated and is concerned that workers must "fend for themselves because their employer is testing a vague area of the law." (Res. at 9). Ilaszczat requests that the Supreme Court set forth a clearer statement of the reach of the zone of special danger doctrine to facilitate a reduction in litigation regarding DBA coverage of "hundreds of injured or deceased American heroes of the war on terrorism.". (Res. at 12).

While the Petitioner disputes that Ilaszczat was abandoned or that he is comparable to an American hero, Ilaszczat raises the important and compelling issue that employees who are injured while working oversees in Iraq, Afghanistan, or other fronts in the war against terrorism, may find themselves in a particularly dangerous circumstance should an issue arise as to

whether the cause of their injury fell outside the zone of special danger doctrine. At the same time, the Petitioner asserts that Employees, Employers, and Carriers, need to know in advance what conduct will and will not fall within the zone of special danger doctrine. This will assist Employees in advance because they may be less likely to engage in questionable conduct if they are aware that coverage under the DBA is not provided 24 hours per day, 7 days per week on a strict liability basis. An Employer and Carrier also needs to have a clear understanding of the scope of the zone of special danger doctrine to facilitate work place rules of conduct, coordinate off-hour conduct of its employees with the military command, and protect their employees from engaging in conduct for which DBA coverage is not provided.

Thus, consideration of this case as a matter for public policy will serve the compelling purpose of assisting Employees, Employers, and Carriers engaged in ever expanding war against terrorism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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